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20th Century Regulation of Private Property in the United States: Disasters, Institutional Evolution, and Social Conflict [1, 2]

Harvey M. Jacobs, Ph.D. [3]

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[2] The core of this paper draws from Jacobs 2010, though it has been substantially edited and revised for this presentation

[3] *Professor*, Department of Urban and Regional Planning and Nelson Institute for Environmental Studies, University of Wisconsin-Madison, USA; *Visiting Professor*, Institute for Management Research, Department of Geography, Planning and Environment, Radboud University Nijmegen, The Netherlands; *Faculty from Abroad*, Master of Public Policy Program, National Law School of India University, Bengaluru, India

Contact the author at:

Prof. Harvey M. Jacobs
Department of Urban and Regional Planning
925 Bascom Mall/Old Music Hall
University of Wisconsin-Madison
Madison, WI 53706
USA

email: hmjacobs@wisc.edu
phone: 608-262-0552
fax: 608-262-9307
web: *http://urpl.wisc.edu/people/jacobs/*

Introduction

The U.S. is known as a nation founded on and committed to the institution of private property, with some arguing that concerns over property were among the most central in the 18th century revolutionary period. For the first 125 years of its history (1776-1900~) there was limited regulatory-based social management of private property. (There was continuous expropriation of private property, by all levels of government, and conflicts over these actions.)

Beginning in the early 20th century there began a century-long process of change. This change was characterized by increasing amounts of public regulation at the local, state and national levels in three distinct periods – in the early twentieth century, first in urban and then in rural areas, second in the post World War II era as America suburbanized, and third in the latter part of the 20th century with the rise of the environmental movement. These changes were often prompted by one or more types of disasters.

While these changes were always socially contentious, in the first two periods support for regulation far outweighed opposition. Initially this was also true in the third period. But social contention became particularly acrimonious towards the end of the 20th century (and into the beginning of the 21st century). A social movement developed which argued that increasing regulation was a fundamental threat to the legal and social contract that underlay the United States. At some level their argument has been quite effective, resulting in scores of state-based laws supporting their perspective on property rights and the appropriate role for government. The extent of this social contention is likely to increase as the issue as its core – the very nature of private property and what a owner may or may not do with his/her land – is itself evermore contested.

This paper proceeds by providing a colonial-era background to the 20th century debate about property regulation, and then discussing (in varying depth) five waves of disasters in the 20th century: early 20th century urbanization, early 20th century rural deforestation, post war suburbanization, post war industrialization, and late 20th century neo-liberal response. A conclusion brings the themes of these waves together, and speculates on the future of this conflict.

Background - The Colonial-Era Context

The role and place of private property rights was a subject of intense interest and debate among America's founders. For a variety of reasons – philosophical, historical and contemporary – there was a clear sense that the right to hold and control property rights was an important element of a democratic governmental structure.

First there was the reality of the settlement process. Colonial America was settled by Europeans searching for religious and political freedom (the rights guaranteed in the First Amendment to the

U.S. Constitution), and for access to land (Ely 1992). In America's early years European countries were still structured under the vestiges of feudalism. An elite owned most of the land, and the prospects for the ordinary person to obtain freehold (obligation free) ownership was small. America offered an alternative. America was a place where any white male immigrant could, in theory, get ownership of land, and with that land as capital make a future for themselves. America was, quite literally, the land of opportunity.

In America's colonial period, the existence of land converged nicely with new political theories. In particular, drawing from the work of John Locke ideas circulated about notions of ownership and democracy. One came to possess property through using it (which provided the justification for taking land from America's native inhabitants, who were not using it in the European sense of active agricultural and forest management), and freely constituted governments (i.e. democracies) existed for the protection of individual liberties, including the liberty to hold and control property.[1]

The country's founders configured these ideas into a particular and specific relationship. Democracy required liberty, and both in turn required freehold property. Using John Locke's ideas some of America's founders saw that one of the principal functions of forming a government was protection of property. In the debate over the ratification of the proposed U.S. Constitution, James Madison wrote in Federalist No. 54 in 1788, "government is instituted no less for the protection of property than of the persons of individuals" (Hamilton, Madison and Jay 1961: 339). Others, including Alexander Hamilton and John Adams concurred. Adams (1851 [1790]: 280) noted that "property must be secured or liberty cannot exist. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

But it was perhaps Thomas Jefferson who left modern Americans with their most enduring image of this perspective – that of the yeoman farmer. For Jefferson the idea of the yeoman farmer linked the individual's right to own and control property with the very existence and viability of democracy. According to Jefferson, because the yeoman farmer owned his own farm, and could produce food and fuel for himself and his family, he was obligated to no one – he was literally free to exercise his political views as a democrat. For Jefferson it was the very act of ownership that created the conditions that allowed democracy to exist.

But this view of the relationship of property to democracy, and the fact of asserting property's primacy, was not unchallenged. Also drawing from Locke, others saw the need for private property ownership to bow to social needs. As John Locke himself wrote (1952 [1690]: 68-69):

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[1] Cronon (1983) is commonly cited as a pioneering study documenting the attitudes of Puritans towards the Native Americans use of their land in the colonial settlement period, an attitude which, either sincerely or cynically, understood Indians to not own property because they were not engaged in what Europeans saw as active agriculture and forestry practices.

> For it would be a direct contradiction for any one to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by the laws of society, should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is subject.

Echoing these sentiments were Thomas Jefferson (a founder whose opinions can be cited by all sides to this debate), Benjamin Franklin and others. Benjamin Franklin is perhaps the most articulate proponent of a counter-position to that of Madison, Adams, Hamilton and others. For example, in the debate over the ratification of the Pennsylvania state constitution, Franklin (1907 [1789]: 59) said: "Private property is a creature of society, and is subject to the calls of the society whenever its necessities require it, even to the last farthing." In other words, Franklin did not see property rights as sacrosanct.[2] Instead he appeared to view as legitimate the public's right to create, re-create, take away and regulate property as it best served public purposes.

Property – private property – was thus a confusing issue for the founders. How were these disparate positions resolved? With ambiguity. In 1776 the Declaration of Independence promised each (free, white, male) American "life, liberty and the pursuit of happiness." What is telling about this phrase is that Thomas Jefferson, the Declaration's author, borrowed it from Locke. Locke's phrase was life, liberty and property. This is what Jefferson wanted the Declaration to say, as a way of furthering his vision of a nation of yeoman farmers. Jefferson's ideas, however, did not hold sway.

Eleven years later, in 1787, the U.S. Constitution was adopted as a replacement for the Articles of Confederation. What did it say about land-based private property? Nothing! It was not until 1791 with the adoption of the Bill of Rights that the now infamous and contentious so-called "takings" phrase appeared as the closing clause to the Fifth Amendment to the Constitution: " . . . nor shall private property be taken for public use, without just compensation."[3]

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[2] These sentiments by Franklin were not isolated. As noted by Brands (2000: 623) "Franklin took a striking socialistic view of property." Brands (2000: 623) provides these other examples of Franklin's opinions: "All property . . . seem to me to be the creature of public convention." "All the property that is necessary to a man for the conservation of the individual and propagation of the species is his natural right, . . . but all property superfluous to such purposes is the property of the public, who by their laws, have created it, and who may therefore by other laws dispose of it whenever the welfare of the public shall demand such disposition."

[3] The U.S. Constitution does speak to private property, but just not about land-based private property. What the Constitution recognizes are slaves as property under Section 2 of Article IV, where it establishes the right of owners to have escaped slaves returned to them. Also under Section 2 of Article III, the Constitution establishes a procedure for how conflicting claims to state-based land grants by individuals would be resolved.

With the adoption of this phrase, the Constitution formally recognized four concepts: the existence of private property, an action denoted as taken, a realm of activity which is public use, and a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken (i.e. seized by the government without the landowner's permission) but only for a denoted public use, and when just compensation is provided. If any of these conditions are not met, then a takings may not occur. But the clause does not say and colonial commentary does not clarify what constitutes private property, exactly when a taking has occurred, what is a public use, and what makes up just compensation.

In the colonial period and for a century afterwards disagreements about the place of private property in a democracy and the exact meaning of the takings clause were largely theoretical (though this presentation of policy and legal history is itself challengeable; see for example Siegan 2001). There was little regulation of land as we currently understand it. Yet in the U.S. governmental management of private property rights is as old as the country itself (e.g. Bosselman et al. 1973, Ely 1992, Treanor 1995). Even before the U.S. emerged as a new country, colonial governments passed local laws which seem to be clear antecedents to modern land use and environmental regulations. For example, colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent over planting, and colonial Boston, New York City and Charleston all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from existing within city limits.

And when government determined that it needed to take property, the public use was generally clear – land for a school, a road, or other public facility – and the owner was compensated. For much of the 18th and 19th centuries there was little social conflict over private property rights. The new country had land in abundance, and it was the disposition of public land, not the acquisition of private land, that dominated the public agenda (Gates 1968). It was not until the twentieth century that this changed.

A First Wave Disaster – Early 20th Century Urbanization

The twentieth century ushered in an entirely different period in American land use policy history, and thus social conflict over property rights. The "frontier" was settled (Turner 1893, Gates 1968). Public policy focus shifted from the disposition of America's public lands to the management of its land resources. With this shift, America experienced a significant re-configuration of its demographic and spatial make-up. The 1920 U.S. Census officially recorded the shift from a rural to an urban nation. The turn of the century (1880-1920) was a period of intensive immigration, industrialization and urbanization. It was in response to these conditions that modern land use and environmental planning and policy and the modern relationship of the state to the individual via private property rights was born. Cities and states began to pass regulations to manage public health and safety conditions. The impact of these regulations was to burden individual landowners – both private landowners and corporate landowners. Out of these new spatial and economic conditions arose a concern about the appropriate limits to government regulation.

In this context, and throughout the century, the U.S. Supreme Court found itself called upon to interpret the meaning of the takings clause in conditions very different than those in which it had been written. There is a huge body of scholarship about how to understand and approach the jurisprudence of the court. For the purposes of this discussion, I rely heavily on the analysis and interpretation of Kayden (2004).

At first, the Supreme Court's answer to the question of whether there were limits to government management – regulation – of private property was simply and strongly no. As the century began, the Court affirmed the right of government to regulate absent any obligation for compensation. In language that now seems quite sweeping, the Court in 1915 examined the matter of government regulation and its impact on the individual. Its conclusion:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

But the conditions of the period were to keep the issues before the Court for another decade-plus. Within less than a decade, the Court, examining the issue again, seemed to completely change its mind about the reach of government power.

The key case in this regard is that of Pennsylvania Coal v. Mahon in 1922 (260 US 393 (1922)); subsequently referred to as Penn Coal). It was here that the Court defined the 20th century concept of regulatory taking. In this case the Court was asked to determine the validity of a state-based regulation that impacted the usability and integrity of mining-based private property rights. As noted above, they were operating in a context in which they themselves had validated a wide range of government regulations, some quite onerous, as long as the landowner was left with some property rights. In a decision that has echoed down through the years, the Court said in Penn Coal: "The general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking" (260 US 393 (1922): 415; emphasis added). In other words, a regulation can be equivalent to a takings under the Fifth Amendment. If it is, then compensation is required. But what the Court did not say is exactly where the line is that distinguishes regulation that "goes too far" from regulation that does not.

The second case of importance from this period was the Court's ruling on the validity of zoning. New York City is credited with inventing zoning in 1916. In 1926 the Court examined the idea of allowing a local government to regulate land use by designating land use zones, which provided for different levels of development opportunities (Euclid v. Ambler Realty 272 US 365

(1926)). The Court decided yes, such an approach to the management of private property rights was acceptable; zoning was a reasonably exercise of governmental authority.

Zoning emerged because of a wide-spread perception of disasters in the urbanization process (Hirt 2014, Needham 2015). Unmanaged – market directed – urbanization generated public health disasters because of over-crowding and a consequent lack of access to clean water, an inability to properly dispose of human waste, limited sunlight and fresh air in tenement buildings and thus the proliferation of numerous diseases. In the late 1800s, Jacob Riis a pioneering photojournalist published How the Other Half Lives (Riis 1890). It was Riis's intent to document the squalid living conditions in New York's slums and as such to motivate New York's middle and upper classes to actions that would improve these conditions. Actions did result, and decades later zoning was one of these.

Within a decade of zoning's adoption by New York City's cities of all sizes throughout the U.S. copied it; zoning was perceived as a pragmatic solution to a suite of land use problems that most cities were experiencing at some scale: rapid population growth, industrialization, incompatibility in land use activities, and the need to protect property values. When zoning came before the U.S. Supreme Court it was strongly contested. Arguments were that it itself was an example of regulation "going too far" (the standard the Court set in 1922) and that it violated fundamental protections and understandings established in colonial times (Revell 1999, Wolf 2008).

As the Depression loomed, the Court said: regulation that "goes too far" is unacceptable, but that regulation of private property rights through zoning is acceptable. So where was "too far?" The Court was not to define this in advance. In practice, this was not a problem, as most governmental bodies did not use their authority to impose onerous requirements upon landowners.

A Second Wave Disaster – Early 20th Century Rural Deforestation

A parallel land use phenomena to that of rapid and unmanaged urbanization was occurring in the northern Lake States (Michigan, Wisconsin, Minnesota) in the same period – the latter part of the 19th and the early part of the 20th centuries. Ecologically, this was an integrated region of old growth forest land comprising tens of millions of hectares. It drew the attention of corporate forest interests who acquired the land in order to ship wood out of the region (for example in Wisconsin and Minnesota via the Mississippi River). The primary focus of these interests was harvesting, not sustainable land management.

Post harvesting many of these interests abandoned the land – literally walking away from their ownership of it and sending it into tax default which resulted in public ownership. Whether owned by the public or still by the forest corporations a principal thrust post harvesting was to sell it for a marginal amount to immigrants to whom it was marketed with the promise that it could be used for farming (e.g. Gough 1997). However, these promises proved false. The

climate, the soil, and the agroecological conditions make the area largely unsuited for agriculture. The result of the forest harvesting and subsequent attempt to farm the marginal land resulted in widespread ecological and then social and public fiscal disasters, analogous to the better known phenomenon of the Dust Bowl in the American southwest during the economic depression of the 1930s.

The states and their local communities were unprepared for the extent of this problem and had no strategy for how to address it. Their eventual response was to re-invent zoning, a land use device developed to manage urban land conflicts, as a rural land use management tool. First Wisconsin (in 1929) and then the other states passed state legislation authorizing and encouraging rural communities to use this approach (Rowlands 1933, Wilson 1957-1958).

As with urban zoning, this response had the same rationale. That is, it was because of unmanaged market-driven decision making by forest corporations and then the cumulative non-sense of individual decision making of settlers trying to establish farms that policy makers felt the need to provide a tool to balance private and public interests in land use. This new form of zoning focused on the land use activities of the region, seeking to identify, classify and manage those lands which were appropriate for agriculture, forestry and recreation.

Unlike urban zoning, however, rural zoning met with more resistance. Reflective of the values espoused by Jefferson in the colonial period, rural residents tended (and still tend) to hold private property in high regard and to be skeptical of government intervention via regulation into the management of property and property rights.

A Third Wave "Disaster" – Post War Suburbanization

The principal land use phenomenon of the post WWII period in America was suburbanization. Americans left the city in a flood. Whereas before they had often lived in multi-family dwellings now they acquired their own homes with a piece of land, where their children could play and they could garden. This phenomenon has garnered commentary ranging from the laudatory to the condemning (see, for example, Jackson 1985, Hayden 2004). Without passing judgement on the suburbanization process per se, I want to stress its "disaster," though this was a disaster of a different type than that of the early 20th century.

Almost without exception as suburbanization occurred communities adopted zoning. As with New York City's original zoning broad coalitions of varied interests came together to support land use regulation. For the new homeowners the overriding concern was the potential of unregulated land use to result in impacts which could negatively affect property values. For the overwhelming majority of those moving to these suburbs their house and land was their primary form of wealth and their principal investment in the future, and so interest was high in institutions which would protect this investment (Fischel 2001). For land developers and other commercial interests the concern was in having a set of transparent land use rules (Molotch 1976).

So as suburbanization exploded so did the use of zoning. Thus the disaster of this period was not what happened, but the anticipation of what might happen (negative impacts on property values) and acting so as to keep it from happening (through the adoption of zoning). A result of this was that an increasing number of people became acquainted with the idea of government exercising regulatory authority in the public interest, where they were the direct beneficiaries of this public interest. Some scholars have argued that this became one of the phenomenon that laid the basis for the emergence of environmentalism in the late 1960s (Rome 2001).

A Fourth Wave Disaster – Post War Industrialization

In the 1960s after decades of relative quiescence, public perceptions of disasters analogous to those that gave rise to zoning again prompted new forms of regulation, this time especially at the national and state levels. Burning rivers, unsafe drinking and fishing waters, industrial-based air pollution, and species extinction led to an array of laws and regulations whose purpose was to restrict the rights of private property owners, and to do so through the use of the regulatory powers of government.

This literal explosion of laws, policies and regulations at the national, state and local levels was exemplified by national laws such as the The Clean Air Act, Clean Water Act, Coastal Zone Management Act, and National Environmental Policy Act (Moss 1977 provides one then-contemporary chronicling of these). Many state governments mimicked these national laws (so-called little NEPAs) and in addition about a dozen states undertook what came to be called the "quiet revolution in land use control" (Bosselman and Callies 1971), These states re-asserted their Constitutional authority to regulate private land use activities at the state level. And local governments across the country began what has become decades-long experiments in public policy approaches to protect and manage farmlands, wetlands, open spaces, watersheds, threatened habitats, urban sprawl, etc.[4] One set of analyses suggests that this policy experimentation represented a broader shift in American society from production to consumption values (see, for example, the discussion in Heiman 1988).

In general, this new orientation on the part of government seemed to enjoy broad support. At the national level it was initiated under a Republican President (Nixon); it did not appear to be ideological. But seeds of discontent began to appear in the policy literature which by the late 1980s would sprout into the private property rights movement (e.g. McClaughry 1976). So that by the time Ronald Reagan assumed the Presidency in 1980 environmentalism and environmental management via regulation by government was increasingly characterized as anti-market and fundamentally anti-American.

Why was this so? Because something had changed in the analysis which justified government intervention. Zoning in the early 20th century, and even in the post War period, was based on the premise that there was market failure and government intervention was required to achieve a

[4] Daniels and Bowers (1997) is an example of these approaches applied to farmland protection; Nelson and Dawkins (2004) is an example of these approaches applied to urban containment.

reasonable balance of public and private interests. But this intervention was not premised on any fundamental critique of either property or market functioning. Increasingly there emerged a more sharply articulated argument that the underlying premise of economic growth and production was itself flawed (e.g. Meadows 1972, Opuls 1977). The regulatory activity that emerged more strongly challenged the activities of individuals and corporations.

A Fifth Wave Disaster – Late 20th Century Neo-liberal Response

It was in this context that the so-called private property rights movement emerges. From the perspective of the property rights movement, the intent of key American founders and the principles embodied in the founding documents of the U.S. make the protection of private property rights a key element of the American political and social contract (Jacobs 1998b). Following from Jefferson's idea of the yeoman farmer, ownership provides the conditions upon which liberty and the exercise of democratic citizenship are based. Without the availability of property, liberty and democracy – in the American configuration – are diminished. Thus, what is needed is a national state strongly committed to the ideal and the reality of private property, the protection of this property, and the integrity of this property.

This framing of American history comes together with an alarmist view of 20th century public policy and law. From the perspective of the property rights movement, the last 100 years presents a story that appears to move away from a view of property rights as integral and central to liberty and democracy. Instead, what appears is a story in which government is allowed ever increasing authority to intrude upon, reshape and take away property without respecting the protections afforded property by the Constitution. Despite the promise contained in Penn Coal (1922) that regulation that "goes too far" will be recognized as a takings, in practice legislatures and the Court seem to continuously affirm the right of government over the rights of individuals with regard to property.

The private property rights movement was formally born in 1988 with a focus on western U.S. land resources, and labeled itself as the wise use movement (Gottlieb 1989).[5] However its intellectual and geographic antecedents originate at least with the rise of the modern environmental movement. What exists today is a national coalition targeting national, state, and local land use and environmental laws, policies and programs, such as the those for endangered species protection, smart growth, farmland and wetland protection, etc. This coalition argues that these attempts at the management and restriction of private property are un-American, inefficient, and ultimately, ineffective.

The property rights movement has pursued a multi-level strategy to achieve their objectives – judicial, legislative, policy and public relations (Jacobs 1998a). They have assisted in the formation and funding of (non-profit) law firms to develop and pursue property rights cases, they

[5] Since then it has gone through a variety of labels – wise use movement, land rights movement, property rights movement – settling on a version of the latter as the most generic (Brick and Cawley 1996).

have helped to develop a line of legal thinking consonant with their perspective on property rights, they have engaged in targeted education of law faculty, judges and others, and they have worked to network like minded intellectuals and activists (see the discussion on these and related points in Teles 2008). However, in conceptualizing an approach for engaging this issue they decided early on to not rely on legal decisions alone. They supplemented a legal strategy with a policy and legislative strategy. In their early years, this strategy was focused at the national level, exploring what could be accomplished via Executive Orders issued by the President, and through legislation proposed in the U.S. Congress (Folsom 1993). But much to their frustration, there was little outcome for this activity. Quickly therefore the movement's strategy shifted towards state legislatures. And here they found fertile ground for their arguments and their ideas.[6]

Beginning in 1991 every state in the U.S. considered state-based legislation in support of the policy position of the property rights movement, and by the decade's end 27 states have passed such legislation (Jacobs 1998a). These states are on both sides of the Mississippi, they are "red" and "blue" states, and extend from Maine to Washington, the Dakotas to Texas, with eleven of these states east of the Mississippi River.

In addition to a state-based strategy, the property rights movement also pursued a more local strategy, focused at the county level, primarily in the American west. Based on an obtuse interpretation of language in NEPA, the movement promoted what they deemed as "culture and custom" ordinances (Hungerford 1995). These ordinances were so-called land use plans. What they did was assert the primacy of the county as the lead governmental agency for all aspects of land use and environmental planning and policy, even when county-based policy conflicted with state or federal planning and policy. Even though this approach has been found to be blatantly illegal – a violation of the supremacy clause of the U.S. Constitution – it was actively promoted in over 300 counties, adopted by scores of counties as far east as Michigan, and actions based on it became prominent in national media coverage of the movement in the mid-1990s.[7]

By the late 1990s the property rights movement had come to a policy standstill. They had been effective in passing state-based laws, they had been effective in promoting county-based laws,

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[6] The states have always been central players in the land use drama. It is they who have residual authority under Article X of the Bill of Rights for land use, which in turn leads them to adopt enabling legislation passing this authority along to sub-state governments. Even under the Kelo decision (see the discussion below) the Court made explicit that its decision applied to an interpretation of eminent domain authority as authorized by the U.S. Constitution, but that states could further interpret and restrict this authority as they felt it to be appropriate and as it fit within state constitutions and law: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (545 US 469 (2005): 489).

[7] Boundary Backpackers, et al. v. Boundary County, et al. 913 P. 2d 1141 (1996) is the legal case; the county movement was profiled on the front cover of Time magazine on October 23, 1995, under the title "Don't Tread on Me: An Inside Look at the West's Growing Rebellion," focusing on the resistance and defiance activities of a group of residents in Nye County, Nevada.

they had been effective in garnering significant media attention to their cause, but they had been ineffective in changing the fundamental way government – at the national, state and local levels – acted towards and upon property.

With the dawn of the 21st century, the movement had an opportunity to revise their strategy. Largely this came about because of the election of George W. Bush to the White House (Jacobs 2003). With a sympathizer occupying the president's office, the movement decided to try again for nationally based action, through the President's office and through Congress. Initially it appeared that they were going to have a great deal of influence. Patterns of appointments and non-appointments in the administration suggested this. However, several factors – principally the systemic impact of 9/11 on Administration priorities and Congressional realignments – forced the movement back to a state-based strategy. The outcome of this move appeared to yield more than was anticipated.

In November 2004 the property rights movement sponsored an initiative in the state of Oregon directly intended to undercut the influence and impact of Oregon's 30 year old and model approach to land use and environmental planning and urban sprawl management (Sullivan 2006, Blumm and Grafe 2007). It was closely watched nationally, because of Oregon's role as a leading state in the area of land use and environmental planning (Adler 2012). The initiative – Measure 37 – passed by a 61% majority. The measure forced the state of Oregon and local governments to either remove the requirements of their 30 year-old land use law on properties owned by people who owned them prior to the adoption of the law and have owned them continuously since then, or to provide compensation to these owners for the burden of the law.

The adoption of Measure 37 by such a strong majority in Oregon emboldened the property rights movement. Their thinking – if they can shape citizen attention and grab citizen support in Oregon, they can do this anywhere. Parallel efforts began bubbling in other states.

Post Measure 37 and Kelo

9/11 (2001) changed the domestic policy landscape in several ways. First, the Bush administration, which had come in to office with an almost dismissive attitude toward international events found itself necessarily pre-occupied with international affairs. And, perhaps most importantly for the property rights movement the Bush administration approached this new policy climate with an attitude that suggested the need to curb and-or reconfigure fundamental and foundational Constitutional rights and protections (Jacobs 2003). Therefore, not only was the national administration no longer necessarily responsive to proposals for national-based action with regard to property rights but a political-policy strategy which relied on an argument on the need to protect foundational Constitutional rights seemed less compelling in the new policy environment. The question presented to the movement was: what to do?

Part of the answer came from the very structure of American government and the actions that unfolded in the state of Oregon (detailed above). The potential of Measure 37 was limited

however. Few states have a type of state-wide land use planning program similar to Oregon's and the strategy for advancing similar measures was only viable in states with the initiative option. For the property rights movement, however, their fortunes were bolstered by the seemingly unfavorable 2005 decision from the U.S. Supreme Court of Kelo v. New London, CT.

The Kelo case posed the question of whether government could exercise eminent domain (expropriation) over private land when just compensation is paid, but the public use being pursued is increased economic development opportunities and increased land taxation. From the decision and subsequent commentary it is clear that the justices found this case confounding. The case was decided by a one vote margin (5-4) in favor of government's right to act in this way. It would appear that in making this decision the Court struck a blow against the property rights movement. But subsequent state-based actions leave one to wonder.

The Kelo case established what was permissible under federal law. But it did not mandate how states were to behave. Instead the decision made clear that states could refine the range of allowable governmental activity within the bounds of state constitutions and state law (see note 6). And this is precisely what has happened since.

Under the banner of rapacious government activity, property rights activists used the Kelo decision to initiate a public conversation about property rights. The property right movement's success in bringing this conversation into the public realm has been breath-taking. They have managed to put the issue into the most mainstream of media fora, and they orchestrated a set of successful votes on anti-Kelo measures in over 40 U.S. states. Yet, like the state-based property rights laws of the 1990s the actual impact of these laws is less clear (Jacobs and Bassett 2011).

Kelo (largely, and Measure 37 secondarily) has allowed the property rights movement to give their issue and perspective public visibility, to make it a national issue, and, importantly, to establish the issue as one of oppressive government and vulturous big corporations versus the working class common person, thus "stealing" a long-standing perspective from the "liberal-left." Via the public "outcry" that has been orchestrated in reaction to Kelo, the property rights movement has been able to establish in the public mind what they are for: strong property rights, reduced government regulation, and a system that entrusts people to make their own decisions about their own land. Most fundamentally, the property rights movement is arguing that nothing has changed in America's social contract over property rights; they are for linking contemporary institutional structures around property rights to their interpretation of long-standing "guarantees."

Conclusion

In the fall of 2006 the property rights movement had the opportunity to demonstrate the strength of their apparent support. Following their victory in the state of Oregon with Measure 37 in 2004 and the public outcry over the U.S. Supreme Court's 2005 decision in Kelo, the movement orchestrated a set of votes about property rights issues in six states (Arizona, California, Idaho,

Montana, Nevada and Washington). Much to the surprise of the property rights movement these measure failed in five of the six states, including some states with long-standing, well known, strong property rights traditions; only Arizona's passed (Jacobs, Hannah 2007). Then in 2007 the citizens of Oregon had the opportunity to re-consider their 2004 vote. By a nearly two-third's margin, voters approved Measure 49, which was touted as turning back many of the more anti-planning, pro property rights components of 2004's Measure 37.[8]

What does all this mean? How does an observer make sense of what appears to be a pendulum swing of voter actions and opinions? Let me say what I think it does not mean. Votes in 2006 and 2007 do not mean that social conflict over property right is over in the United States. Conflicting concepts about the rights of the individual and the right of government vis-a-vis property is a multi-century issue in the U.S., whose character changes with the social conditions of the times (Jacobs 1999).

In the short term, the property rights movement has shown itself to be very adept at learning from its experiences in the courts, in the legislatures and with the media. Theirs is a long-term project. While they may be frustrated by short-term setbacks, they are impassioned by their perspective on property rights, and the need, from their perspective, to restrain government power and reframe public discourse (Jacobs 2007).

Reflective of the structure of U.S. government, it is largely at the level of the states that power and action for planning and property rights occurs. I expect that the property rights movement will continue to promote actions in states across the U.S. to further its vision of the proper (restrained) relationship of government to the individual regarding property rights. And advocates for the counter position will continue with their argument that planning and government regulation are fundamentally American, consonant with American values, and in fact protective, rather than threatening, of property rights.

Americans are ambivalent. We value private property and we are skeptical of government management of that property vis-a-vis regulation. But unchecked market activity which generated a series of disasters in urbanization, deforestation and industrialization and the key place of property in personal wealth portfolios during post-War suburbanization, allowed regulation to arise and find a place that seemed appropriately American by providing a reasonable balance between private and public rights in land. Yet after nearly 100 years this balance has become seriously challenged by a social movement which focuses on their assertion of the inappropriateness and ineffectiveness of regulation developed in response to disasters. Where they acknowledge problems that need to be addressed, they bring forth an alternate approach: free market environmentalism (Anderson and Leal 2001).

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[8] Clearly some of the bases for the ability to overturn Measure 37 were its land use and fiscal impacts. By the fall of 2007, more than 7,700 claims had been filed under Measure 37, seeking land use development permission for a total of 800,000 acres, and claiming potential damages from state and local government in the area of $17 billion!

So what will be the "ultimate" or "final" outcome of this debate about property rights? It is not clear that this debate – which goes to the core of social and political debates in the U.S. – will ever be settled. In fact, it is likely to become ever sharper. Drawing upon the environmental consciousness embodied in the emergence of Earth Day in 1970 an ever widening set of environmental ethicists, legal scholars, policy analysts, planners and others, are wondering if the very nature of private property itself needs to undergo fundamental revision (see, for example, Large 1973, Stone 1974, Goldstein 2004). Continually talking about, even fighting, over conflicting concepts of property rights is one of those processes that is both central to and necessary for the American experience. Through these debates and the imperfect solutions that they generate Americans will, as they have in the past, come to understand themselves with regard to private property and through this the appropriate way to manage disasters and through this the appropriate role of state power to manage private property.

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